



March 1, 2000

Ms. Margaret Hoffman  
Director  
Environmental Law Division  
Texas Natural Resource Conservation Commission  
P. O. Box 13087  
Austin, Texas 78711-3087

OR2000-0822

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132655.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all documents relating to Koch Petroleum Group (Koch) submitted from 1994 forward, including upsets and planned maintenance reported to the commission, emissions inventory questionnaire responses, any SIP (state implementation plan), enforcement actions threatened or taken, and compliance history. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. You also claim on behalf of Koch that certain documents are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

In accordance with section 552.305 of the Government Code, you have notified Koch of the request. Koch has responded, identifying the requested information as all being related to its Corpus Christi, Texas West Refinery. Koch objects to the release of certain specifically identified information, claiming that that information is excepted from required disclosure under sections 552.101 and 552.110, but does not object to the release of the remainder of the requested information. Therefore, the commission must release responsive documents

to which Koch has not objected. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 382.041(a) of the Health and Safety Code provides that “a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a *prima facie* case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission.

To establish a *prima facie* case that information is a trade secret under section 382.041 of the Health and Safety Code requires the same analysis this office generally considers under section 552.110 of the Government Code.<sup>2</sup> Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine

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<sup>1</sup>You submitted to this office for review representative samples of the requested information. Koch submitted a list of documents it has identified as containing confidential trade secrets. In reaching our conclusion here, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>Because section 552.110 of the Government Code and section 382.041 of the Health and Safety Code both protect trade secret information from required public disclosure, but section 382.041 imposes the additional requirement that the information be identified as confidential when submitted to the commission, we will continue our analysis under section 552.110 only.

or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

After examining all of the arguments and the submitted documents, we conclude that Koch has presented a *prima facie* case that the documents and other information at issue constitute trade secrets and are confidential under section 552.110. See Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the commission must withhold the information pertaining to Koch's Corpus Christi, Texas West Refinery, which is identified as confidential in Koch's Attachment 1. The commission must release the remaining requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson  
Assistant Attorney General  
Open Records Division

PMA/jc

Ref.: ID # 132655

Encl. Submitted documents

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